because the jury had been instructed in accordance with the latter. The same view and the same result occurred in *What Cheer Coal Co.* v. *Johnson*, 56 Fed. R. 810 (C. C. A. Eighth Circuit, June 26, 1893), and yet in neither case was the Ross case treated as overruled. In *U. P. Ry. Co.* v. *Callaghan*, 56 Fed. R. 988 (C. C. A. Eighth Circuit, July 10, 1893), the Ross case was followed as to a conductor and an employee merely riding on the train. In *Minneapolis* v. *Lundin*, 58 Fed. R. 525 (C. C. A. Eighth Circuit, Oct. 30, 1893), the Ross case was not treated as overruled, and the doctrine of the Federal courts was said by Sanborn, J., to be, that if an employee is "entrusted with the entire management and supervision of all the business of the corporation, or with the entire management and supervision of a distinct and separate department of its business, . . . he may be termed a general vice-principal, because, in all his acts relative to the business of the corporation, he stands in the place of the master, and the latter is liable." So in *Bloyd* v. *St. L. & S. F. Ry. Co.*, 22 S. W. 1089 (Ark., July 1, 1893), the Ross case and the Baugh case were held to be distinguishable. In *A. T. & S. F. Ry.* v. *Martin*, 34 Pac. R. 536 (N. Mex., Aug. 16, 1893), a very elaborately considered case, the Ross case is treated as overruled, and the Baugh case said to contain "the view . . . held by the majority of courts, which base the fellow-servant relation upon the character of the negligent act, rather than upon the grade or department of work." In *Ill. C. Ry. Co.* v. *Spence*, 23 S. W. 211 (Tenn., Sept. 21, 1893), the Ross case is also said to be overruled; and, finally, the Supreme Court of Rhode Island, in *Hanna* v. *Granger* (March, 1894), says, in deciding the case of one injured by the negligence of the engineer of a steam-roller, who, although in charge of the work, was held to be acting at the moment as a fellow-servant (followed by the same court in *De Marcho* v. *Builders' Iron Foundry*, where a foreman threw a box upon a pile of iron posts), says that the Ross case is "explained. Indeed, we may almost say that it is explained away" by the Baugh case.

In view of the difference of opinion, no one will care at present to say what the final effect of the authorities will be. In the Ross case the Supreme Court introduced the doctrine into good society. How will it get along now that its sponsor seems to have disowned it? And will its sponsor take it up again?

RECENT CASES.

AGENCY — INDEPENDENT CONTRACTOR — LIABILITY OF OWNER OF PREMISES. — Defendant company made a contract with A, whereby he was to "fall and burn" the bush on defendant's land. A negligently lit a fire on the land while there was a strong wind blowing in the direction of plaintiff's land. The fire spread to plaintiff's land, doing great damage. *Held*, that defendant was liable for the negligence of its contractor, on the ground that the act to be performed was one necessarily attended with great danger, and a proprietor who authorizes it is bound to see that all reasonable precaution is observed. *Black* v. *Christ Church Finance Co.* [1894], App. Cas. 48 (Eng.).

This decision rests upon a well-recognized exception to the "Independent Contractor" doctrine, viz., that a principal is liable for the negligence of his contractor in performing a duty which the law absolutely imposes on the principal, or which is in its nature dangerous and liable to result in injuries to third parties. Mechem on Agency, § 747. It seems quite clear that this case falls within the exception.

BILLS AND NOTES — USURY — CONFLICT OF LAWS. — Defendant, a resident of Iowa, borrowed money of plaintiff's transferor in New York, and gave a note dated as made in Iowa, but actually made in New York. No place of payment was stated. The rate of interest was stated to be seven per cent, — lawful in Iowa, but usurious in New York. *Held*, the parties executed this note intending it to be controlled by laws of Iowa, so it is valid and enforceable in that State. *Bigelow* v. *Burnham*, 57 N. W. 865 (Iowa).

There is quite a little authority holding, in accord with this case, that when a contract is made in one country or State to be performed in another, the validity of the contract is to be determined by the law of the latter place. Story, Conflict Laws, 7th ed. c. 280. Some of the earlier United States Supreme Court cases held this way, and New Hampshire, New Jersey, and New York seem to hold this view. *Contra*, are later United States cases, — Massachusetts, Illinois, Indiana, Iowa, and Wisconsin. A very good case holding this way is *Akers* v. *Demond*, 103 Mass. 318.

The view *Contra* seems correct for no contract has ever arisen, as the law of the State where the contract is made says that such a consideration shall be practically the same as no consideration.

CONSTITUTIONAL LAW — POWER OF THE LEGISLATURE OVER THE CONTRACTS MADE BY EMPLOYERS WITH THEIR EMPLOYEES — CORPORATIONS AND NATURAL PERSONS DISTINGUISHED. — The Legislature of Arkansas passed an Act requiring corporations, companies, and persons engaged in business of operating or constructing railroads, . . . and contractors and sub-contractors engaged in the construction of any such road, to pay their employees, on the day of discharge, the unpaid wages then earned by them, at contract price, without abatement or deduction. *Held*, that the Act was valid in so far as it applied to corporations, but was void as applied to natural persons. Bunn, C. J., dissented, thinking the Act void *in toto*. *Leep* v. *St. Louis, I. M. & S. Ry. Co.*, 25 S. W. Rep. 75 (Ark.).

Cases of this nature are becoming more and more common, and the decisions in the different States are not altogether in harmony. The distinction which is made in the above case between natural persons and corporations seems to have no good foundation. It would seem that in both cases such an Act is fully within the legislative power, and the advisability of its existence is something with which the courts have no concern. The right to contract, which a man has, is not property, and taking it away in a given case, where it appears to the Legislature that the contracting parties are not on an even footing, would seem to be perfectly constitutional; i. e., it is difficult to see what clause in the Constitutions, as generally found to exist, would prevent it. It must be admitted, however, that there exists a tendency to favor the unconstitutionality of such Acts. See *Commonwealth* v. *Perry*, 155 Mass. 117 [1891].

CONTRACTS — DISCLOSURE OF TELEGRAPHIC DESPATCH. — The servants of the defendant company wilfully disclosed the contents of a telegram sent by plaintiffs, who sued to recover the penalty prescribed by a statute requiring messages to be "transmitted with impartiality and without discrimination." *Held*, that a fair construction of the statute would not warrant its application to such a case as this; especially since other statutes existed which expressly provided for recovery of suitable damages by the aggrieved party in case of wilful disclosure, and rendered such disclosure criminal. *Western Union Tel. Co.* v. *Bierhaus et al.*, 36 N. E. Rep. 161 (Ind.).

The case seems to show a just construction of the statutory provisions, and contains no discussion of the rights of parties in such a case in the absence of statute upon the subject.

CONTRACTS — SERVICES — RECOVERY FOR PART PERFORMANCE. — X, the maker of a note which had been indorsed by the defendant and subsequently taken up by the plaintiff, contracted by the plaintiff to work for him for a specified time in payment of the note. X subsequently refused to complete his term of service. *Held*, that while the plaintiff could not recover from the defendant on the note, he had a right of recovery against X for breach of contract, and was not bound to compensate him for services performed before breach, either under contract or upon a *quantum meruit*. *Timberlake* v. *Thayer*, 14 So. Rep. 446 (Miss.).

The latter propositions seem to be required by previous decisions in the State, and seem also in harmony with the weight of authority elsewhere. See Keener, Quasi Contr., 215, and cases there cited.

CRIMINAL LAW — CONCURRENT JURISDICTION. — The defendant, a pilot on the Hudson River, was convicted of manslaughter on an indictment charging him with having, by wilful negligence, guided his vessel into a yacht, causing the death of a person on the yacht. *Held*, that the State courts have concurrent jurisdiction over the

offence, not being ousted by Rev. St. U. S. § 711, giving to the United States courts exclusive jurisdiction over crimes cognizable under authority of the United States. *People* v. *Welch*, 36 N. E. Rep. 328 (N. Y.).

This affirms 26 N. Y. Supp. 694. Section 711 is construed to refer only to offences against the United States which are not offences against the State, while section 5328 reserves to the State courts concurrent jurisdiction over the act if it constitute at once an offence against the United States and against the State. This construction seems best, to reconcile the sections concerned.

EQUITY — COPYRIGHT — AUTHORITY OF EQUITABLE PART-OWNER. — Suit in equity to restrain defendant from prosecuting an action at law for infringement of a copyright. Defendant Falk, a photographer, had taken the photograph of an actress, as a public person in costume, and copyrighted it, the understanding being that the actress was to have as many pictures, free of charge, as she desired, to do with as she chose. At the request of the orator, the actress gave the orator several of these photographs, which he published in his paper, with her consent, but without the consent of defendant, who brought an action at law against him, under Rev. St. U. S. § 4965, which imposes a penalty for publishing copies of any copyrighted work without the consent of the proprietor first obtained in writing, signed in the presence of two witnesses. *Held*, no right to the orator as a defence in equity not available in law, and he must therefore be left to make his defence at law. *Press Pub. Co.* v. *Falk*, 59 Fed. Rep. 324 (N. Y.).

The orator contended that the actress, although not the legal owner of the copyright, had a beneficial right in it sufficient to authorize her to permit the publishing of the copies. The court disposed conclusively of this contention by saying that even were it sound, yet, as her consent was not in writing and attested as required by the statute, it was of no effect. The court intimate that if the actress had so procured the publication of the article containing the copies, it would have been hers, and that her equitable right would doubtless have protected her and others employed by her; citing *Laurence* v. *Dana*, 2 Amer. Law T. Rep. (N. S.) 402.

EQUITY — INJUNCTION RESTRAINING REMOVAL OF COUNTY SEAT. — In this case a taxpayer, owning large property interests in the vicinity, instituted proceedings in equity to restrain the removal of the county seat, on the ground of fraud in the election, which resulted in favor of such removal. There was no statutory authority for legal intervention. *Held*, by the majority of the court, that the orator had no such interest in the subject-matter as gave him a standing in the court, and that, in the absence of statute, the court could not interfere (see 35 Pac. Rep. 586). Stiles and Hoyt, JJ., dissented to both propositions, and the present report contains a lengthy dissenting opinion by the former, with a full citation of authorities. *Parmeter* v. *Bourne et al.*, 35 Pac. Rep. 586, 757 (Wash.).

EVIDENCE — CRIMINAL ACTS OTHER THAN THOSE CHARGED. — On the trial of defendant for the murder of an infant which he had received from its mother upon an agreement to adopt it, it was shown in evidence that he had received other infants upon similar agreements, and that several infants had been found buried in his garden, where the infant for whose murder he was being tried, was found. *Held*, that this evidence was admissible, being relevant to show that this particular act complained of was designed and not accidental. *Makin* v. *Attorney-General for New South Wales* [1894], App. Cas. 57 (Eng.).

The doctrine of the case is similar to that of *Commonwealth* v. *Robinson*, 146 Mass. 571. These cases show the incorrectness of the oft-quoted statement that in a trial for one crime, evidence of other crimes committed by defendant cannot be given. Such evidence is clearly admissible when restricted to its proper use. For a somewhat extreme application of this doctrine, see *Frazer* v. *State*, 34 N. E. Rep. 817 (Ind.). See also 7 HARVARD LAW REVIEW, 309.

EVIDENCE — JUDICIAL NOTICE. — On an appeal from a decision declaring a contract void, as in violation of the Interstate Commerce Act, — *Held*, that as Kansas City and Wichita were large and universally known commercial centres of the country, the court would take judicial notice of their geographical location, and that transportation by railroad from those places was over lines outside the State of New York. *Parks* v. *Jacob Dold Packing Co.*, 27 N. Y. Supp. 289.

The above case is undoubtedly in accordance with the law. It is to be distinguished from the case of *Kearney* v. *King*, 2 B. & Ald. 301, decided in the Court of King's Bench in 1819, and the class represented thereby. For in that case, the refusal of the court to take judicial notice of the fact that a bill of exchange, headed "Dublin, May 1st, 1816," was drawn at Dublin in Ireland, was on the ground that the court could not

know that there was but one Dublin in the world. In the principal case, however, to call the Interstate Commerce Act into operation, it was only necessary to show that, under the contract, it was contemplated that goods should pass through a foreign State; and as there were no cities in the State of New York of the name of Kansas City, or Wichita, it was matter of common knowledge that goods in passing from those cities must come within the operation of the Act.

EVIDENCE — REFORMATION OF DEED FOR MISTAKE. — *Held*, that a court of equity will reform a deed conveying a quit-claim interest in land, upon proof that the parties to it intended to pass a life estate only. *Deischer et ux.* v. *Price et al.*, 36 N. E. Rep. 105 (Ill.).

The law is undoubtedly as above stated. Courts of equity reform deeds when upon outside evidence it appears that they are founded upon mistakes as to material facts. Chamberlayne's Best on Evidence, 219.

NATIONAL BANKS — INSOLVENCY AND RECEIVERS — ALLOWANCE OF CLAIMS — COLLATERAL. — Creditors of a national bank, in proving their claims, cannot be required to allow credit for collections made after the date of the declared insolvency. The receiver of a national bank objected to the claim of a creditor, on the ground that money collected on collateral, (1) before and (2) after proving its claim, should be credited to the claim. *Held*, the effect of the national bank act is that, after suspension, the right which the creditor had to levy an execution to satisfy his judgment is exchanged for an interest in the assets held by the receiver. This interest is fixed by the full amount of his debt at the time of the declared insolvency, and is not affected by any subsequent reduction of the debt. *Chemical Nat. Bank* v. *Armstrong*, 59 Fed. Rep. 372 (Ohio).

The question is a new one in the Federal courts, and is carefully considered both on principle and on the authorities. The weight of authority in this country and in England supports the decision on the point that no credit can be required for collections made after proof of claim; but the only English case cited holds the contrary as to payments made before proof, and the cases in this country are divided. As the learned judge points out in his opinion, there seems no good reason for distinguishing the cases.

PARTNERSHIP — BANKRUPTCY — EARNINGS OF PERSONAL SKILL. — The bankrupt carried on business in partnership as a dentist. *Held*, that his business returns were not personal earnings within the meaning of the rule which allows a bankrupt to retain personal earnings, and therefore, such returns passed to the assignee in bankruptcy. *In re Rogers* [1894], 1 Q. B. D. 425 (Eng.).

The line lies somewhere between the case of a bone-setter, of an actor, or a singer, "whose earnings depend really upon the personal exertion of the bankrupt, and on nothing else," and the case of a surgeon-apothecary, who sells medicines, or of an architect, who sells plans, or, as in the present case, of a dentist, who has a stock-in-trade and assistants, and whose earnings, although largely the result of personal skill, form the basis of a partnership agreement.

PARTNERSHIP — WHO ARE PARTNERS. — A was to furnish a house for a shooting-gallery. B was to fit it up, furnish the necessary apparatus, and manage the business. The profits were to be divided. *Held*, the portion of profits going to A was purely a compensation for the use of his house. He would have to bear no losses. Such a contract is not one of partnership. *Pullam* v. *Schimpf*, 14 So. Rep. 488 (Ala.).

The contract was simply for a lease, the rental to be determined by the profits made out of the shooting-gallery. It was well settled that such an agreement does not constitute a partnership. *Holmes* v. *R. R. Co.*, 5 Gray, 58. Whether a given contract is one of partnership is in a close case a most difficult question, and no test can be given, from a practical point of view satisfactory. *Cox* v. *Hickman*, 8 H. L. C. 268, laid down the doctrine that participation in profits is not a conclusive test. The case of *Walker* v. *Hirsch*, 27 Ch. D. 460, indicates that even a sharing in both profits and losses does not necessarily involve a partnership. It is said in Parsons on Partnership (4th ed.), § 46: "Parties become partners only by agreeing to enter into an association which the law regards as a partnership. . . . Whether such an association is intended to be formed is a question of fact in each case. . . . The formation of a partnership is the creation of a body apart from the partners, for business purposes, for which the partners are to act and not directly for each other." This test, which makes a partnership depend on the intention to create an entity, and not on mere incidents of the relation like profit-sharing, is the only one which will reconcile the cases. Moreover, this entity view is expressly recognized by some of the best considered recent cases, *Meehan* v. *Valentine*, 145 U. S. 611; and is certainly the only one in harmony with the intention of business men. *Bank* v. *Thompson*, 121 N. Y. 280.

REAL PROPERTY — CONDITION SUBSEQUENT IN GRANT — WHAT CONSTITUTES A BREACH. — A conveyance of land contained an express condition that a certain portion of the land should remain a street, and that no building should ever be permitted thereon. A strip of this portion, sixteen inches in width at one end and two inches in width at the other, was built upon, through an honest mistake as to the boundary lines. *Held*, such breach is insufficient to work a forfeiture. *Rose* v. *Hawley et al.*, 36 N. E. 335 (N. Y.).

However desirable the conclusion reached in this case may be, it seems difficult to support on sound principles of law. The action brought in the courts below was ejectment, founded on a breach of a condition subsequent in the deed. The opinion in the Court of Appeals is based on the ground that the breach of the condition is not substantial enough to warrant the conclusion that it was within the intention of the parties that it should cause a forfeiture. Admitting this to be true, it is a purely equitable defence, which might be conclusive if advanced in a Court of Equity to relieve against a forfeiture at law, but it cannot be considered a good legal defence. If courts of law will give effect to express conditions only when, in their opinion, the breach is substantial, it would seem that there is not much protection to be gained by the insertion of such conditions in a deed. The court say that this was not "within the intention of the parties;" it would seem that if the parties included an express condition in the terms of their deed, their intention, so far as concerned a court of law, was that it should not be broken at all. The court here make it a question of degree, which it should not have done. It would seem very doubtful whether even equity would relieve against the breach of this condition. In 4 Kent's Comm. 130, we find that "the general rule formerly was that the court would interfere and relieve against the breach of a condition subsequent, provided it was a case admitting of compensation in damages. But the relief according to the modern English doctrine in equity is confined to cases where the forfeiture has been the effect of inevitable accident, and the injury is capable of a certain compensation in damages." Here we find no accident, and damages could not be recovered.

REAL PROPERTY — CONSTRUCTION OF WILL — VESTING OF FUTURE ESTATE. — A provision in a will read as follows: "I loan to my wife, during her natural life, all my residuary estate, and my wish is that the property I have loaned to her be sold after her death, and the proceeds equally divided among my four children, or their lawful heirs begotten of their bodies." *Held*, the gift to the children vests immediately, so that an assignment by one during the widow's life is valid. *Chapman* v. *Chapman*, 18 S. E. Rep. 913 (Va.).

This is in line with the policy laid down in *Seller's Ex'r* v. *Reed*, 88 Va. 377, of favoring the vesting of interests at the testator's death. The authorities are discussed in 2 Jarman on Wills (5th Am. ed.), 458.

REAL PROPERTY — RIPARIAN RIGHTS. — Under authority of the territorial legislature, the appellants built and maintained a dam across a navigable stream. Later, the city of St. Paul, also authorized by the legislature, took for its water supply the water of a lake which empties into the river above the dam. The appellants maintain that material damage had been done thereby to their water-power, and ask for a perpetual injunction. *Held*, that the rights of a riparian owner on a navigable stream are subordinate to public uses, and the water may be applied to such without compensation for damages; drawing a supply for the ordinary use of cities is such a public use, and is not subject to the rules which obtain between riparian owners. *Minneapolis Mill Co.* v. *Water Com'rs. of St. Paul*, 58 N. W. Rep. 33 (Minn.).

The extension of the meaning of a public use in accord with the decision of the Massachusetts court in the first *Watuppa Pond* case, 147 Mass. 548, which is mentioned in the opinion. The true ground of the decision seems to be that the State owns the bed of the stream, and not that the stream is navigable, though this does not clearly appear. Navigability alone would hardly support the result reached here.

REAL PROPERTY — WILLS — NATURE OF ESTATE. — Certain deposits had been made by the testator in various savings banks, in his daughter's name. He bequeathed these deposits, with various other property, to her, subject to an executory devise, and the question is whether the daughter must hold what is her own property before the bequest subject to the defeasance. The court *held* that she must, as "to accept the benefit while she declines the burden is to defraud the design of the donor. . . . The conscience of the donee is affected." *Kuykendall* v. *Devecmon et al.*, 28 Atl. 412 (Md.).

This is a question of construction, and doubtless the result is in conformity with the intention of the testator. There seems to be no reason why a court cannot say there is an implied condition, although the testator does not use the word "condition," or separate the daughter's property from the rest bequeathed.

TORTS — CONSPIRACY — TO INJURE BUSINESS. — "The Retail Lumber Dealers' Assn.," by its by-laws, gave an active member a claim against a wholesaler for selling to a person not a "regular dealer" in such member's community, and required members to refuse to patronize a wholesaler who ignored the committee's decisions. Plaintiff, who was not a "regular dealer," underbid defendant on a contract; but wholesalers refused to sell to him, and he was obliged to abandon the contract because defendant, an active member of the association, had previously enforced a claim against a wholesaler who had sold to plaintiff, and expressed an intention of continuing to enforce such claims. *Held*, that defendant was liable for the amount which plaintiff lost by abandoning his contract, and would be perpetually enjoined from making a claim under the by-laws of the association against any person who sold to plaintiff. *Jackson et al.* v. *Stanfield et al.*, 36 N. E. Rep. 345 (Ind.).

The court in an able opinion review the authorities of the several States, and reach the sound conclusion that "the great weight of authority supports the doctrine that where the policy pursued against a trade or business is of a menacing character, calculated to destroy or injure the business of the person so engaged, either by threats or intimidation, it becomes unlawful, and the person inflicting the wrong is amenable to the injured party in a civil action for damages therefor" (p. 351).

TORTS — DECEIT — MEANS OF KNOWLEDGE. — Defendant falsely represented to plaintiff that he had a good title to a certain land. Plaintiff, relying on this, entered into a contract with defendant. *Held*, a bill to rescind the contract is not defeated by the fact that plaintiff could have ascertained the falsity of defendant's representation by examining the registry records. *Baker* v. *Maxwell*, 14 So. Rep. 468 (Ala.).

The defendant admits that he lied, but says that the plaintiff was a fool to believe him, and therefore ought not to be given a remedy. This ought not to be a defence. Of course a representation may be such that no man will rely on it, and many cases apparently contrary to the doctrine laid down above were probably decided on the ground that plaintiff did not act in reliance on the representation. But the representation here was one calculated to put the purchaser off his guard, — to induce him not to look up the title, and to prevent him from using his means of knowledge. It is submitted that the plaintiff had a right to take the defendant at his word, and that the decision should be supported at law as well as in equity. For a good discussion of these principles, see 1 Bigelow on Fraud, 527, 530; *Cottrill* v. *Krum*, 100 Mo. 397; 2 Bish. New Cr. Law, §§ 433-436, and § 464.

TORTS — IMPUTED NEGLIGENCE. — In an action for injuries to the plaintiff's wife, caused by the negligence of the defendant company, it was *held*, that in a State where the wife had been released of all common-law liabilities, and the husband of all responsibility for the wife's torts, her contributory negligence would not bar his action. *Honey* v. *C. B. & Q. Ry. Co.*, 59 Fed. Rep. 423 (Iowa).

None of the authorities cited in this opinion refer to actions for loss of services, and the case rests wholly on the idea that the right of action in behalf of the husband is not derived from the wife, but originates in an injury to the husband's own right. The rule in 1 Shearman and Redfield on Negligence, § 71, for which authority is there cited, covers this case, leads to a more just result, and seems sounder on principle: "When a parent or master sues, for his own benefit, to recover damages for the technical loss of services of a child or servant, . . . any contributory negligence of the child or servant which would suffice to bar an action brought in his name will also preclude a recovery by the parent or master."

TORTS — LIABILITY OF CHARITABLE INSTITUTION FOR TORTS OF ITS SERVANTS. — *Held*, that a purely charitable institution established by the State is not liable to its inmates for the negligent or malicious acts of its servants. *Williams* v. *Louisville Industrial School of Reform*, 24 S. W. Rep. 1065 (Ky.).

There is a conflict of authority on the point here decided. *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432, is in accord with the principal case; *Galvin* v. *Rhode Island Hospital*, 12 R. I. 411, *contra*.

TORTS — LIBEL — PRIVILEGED COMMUNICATION. — The defendant newspaper published an article charging the plaintiff, a candidate for nomination, with selling himself to an opposing candidate. *Held*, that this communication is not privileged as concerning a servant, or one applying for service; that privilege extends to fair comment and criticism of the acts of public men, but not to false allegations of fact. *Post Pub. Co.* v. *Hallam*, 59 Fed Rep. 530 (Ohio).

The court argues that where, as in this case, the sacrifice of private rights outweighs the public benefit, privilege should cease. *Davis* v. *Shepstone*, 11 App. Cas. 187, and American cases following it, are cited with approval. The decision contains a good exposition of the basis of privilege, and seems justifiable.